

## JUDGE SANDRA R. KLEIN'S GUIDELINES FOR VALUING AND AVOIDING LIENS IN CHAPTER 13 CASES

Effective April 22, 2011, all **new** requests to value and avoid liens in chapter 13 cases **must** be brought via motion pursuant to Federal Rule of Bankruptcy Procedure 9014. Such motions (commonly referred to as "lien strip motions," "motions to value," "**Lam** motions,"<sup>1</sup> etc.) **must** be made on Local Form 4003-2.4-MOTION, entitled "Debtor's Motion to Avoid Junior Lien on Principal Residence [11 U.S.C. § 506(d)]" (Motion to Avoid Junior Lien). This form may be found on the Court's website, [www.cacb.uscourts.gov](http://www.cacb.uscourts.gov), by clicking on "Forms/Rules/General Orders," then "Local Bankruptcy Rules & Forms," and scrolling down to F 4003-2.4-MOTION.

Effective April 22, 2011, any **pending** adversary proceedings to value and avoid liens in chapter 13 cases that are reassigned to Judge Klein may, in the discretion of the plaintiff, continue to be adjudicated in an adversary proceeding or may be dismissed and refiled using Local Form 4003-2.4-MOTION. If a pending adversary is dismissed and refiled using Local Form 4003-2.4-MOTION, the motion must be supported by admissible evidence and there must be sufficient notice and service to comply with the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules as outlined below.

If the plaintiff chooses to continue litigating a pending adversary proceeding to value and avoid liens in a chapter 13 case, the plaintiff **must** utilize Local Form 4003-2.5.DEFAULT.MOTION, entitled "Debtor's Motion for Default Judgment Re Complaint to Avoid Junior Lien on Principal Residence [11 U.S.C. § 506(a),(d), FRBP 3012]" for the Default Judgment Motion. This form may be found on the Court's website, [www.cacb.uscourts.gov](http://www.cacb.uscourts.gov), by clicking on "Forms/Rules/General Orders," then "Local Bankruptcy Rules & Forms," and scrolling down to F 4003-2.5.DEFAULT.MOTION. If the court grants Plaintiff's Default Judgment Motion, Plaintiff **must** submit a proposed Default Judgment Order within seven calendar days electronically, using Local Form 4003-2.5.DEFAULT.JUDGMENT, entitled "Default Judgment re Complaint to Avoid Junior Lien on Principal Residence [11 U.S.C. § 506(a)(d), FRBP 3012]." The Default Judgment Order must be submitted via the Lodged Order Upload program ("LOU") in accordance with the LOU Procedures contained in Section 4 of the Court Manual posted on the court's website. Use of Local Form 4003-2.4.DEFAULT.JUDGMENT is **mandatory**.

**After April 22, 2011, if a **Lam** motion is not filed using Local Form 4003-2.4-MOTION, including the proof of service, the motion will not be set for hearing.**

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<sup>1</sup> Lam v. Thrift Investors (In re Lam), 211 B.R. 36 (9<sup>th</sup> Cir. B.A.P. 1997).

## **EVIDENCE**

As Local Form 4003-2.4-MOTION indicates, a Motion to Avoid a Junior Lien must be supported by admissible evidence regarding the amount and priority of the liens at issue and the value of the property. Evidence must be admissible under the Federal Rules of Evidence and persuasive.

1. **Liens.** Without evidence as to the validity and amount of the senior secured loan and the junior secured loan, the requested relief cannot be granted. The debtor's declaration, which contains the debtor's testimony regarding the liens and introduces the documents into evidence, along with a copy of the deed of trust, a loan statement, proof of claim or other statement from the current lender will establish the amount and validity of the lien. No documents will be considered as evidence unless they are accompanied by a declaration. The debtor's testimony alone, without supporting documentation, will not be sufficient to establish the validity and the amount of liens (similarly, the debtor's schedules are not sufficient). The court also does not consider a credit report listing amounts owed to be admissible evidence of validity and amount; it is hearsay.
2. **Value.** The debtor may testify through a declaration regarding the value of the residence. The declaration should contain the basis for the testimony, which may include, among other factors, the debtor's familiarity with the residence, the neighborhood, and recent sales. It is insufficient for the declaration to state: "I believe that my residence is worth \$xxx,xxx." Please note that the debtor may not rely solely on Internet sources, which are inadmissible hearsay. Therefore, a declaration stating "I believe my residence is worth \$xxx,xxx based on the attached report from zillow.com [or cyberhomes.com or any other website]" is not admissible evidence regarding value.

While not required, an appraisal can be persuasive evidence of value. To be admissible, the appraisal must be accompanied by a declaration of the debtor or the appraiser.

## **SERVICE**

Use of the proof of service in Local Form 4003-2.4-MOTION is **mandatory**. The proof of service must be completely filled out to indicate what parties were served, how they were served, and when they were served. Be sure to allow sufficient notice of the hearing date to comply with LBR 9013-1(d) (notice to be served not later than 21 days before the hearing date). If a hearing date is chosen that is less than 21 days after service, the motion will be continued at least 21 additional days to allow for the full notice period.

**Proper service of the Motion to Avoid Junior Lien – including compliance with Federal Rule of Bankruptcy Procedure 7004 and Local Bankruptcy Rule 4003-2(c) – is critical.**

- 1. Parties to serve.** The chapter 13 trustee, the affected lienholder, and all other parties asserting a lien on the property must be served. If any party has made an appearance in the case, that party (and counsel, if applicable) must be served at the address used in its notice of appearance.
- 2. Compliance with F.R.B.P. 7004(b)(3).** This rule applies to domestic and foreign corporations and provides that service may be made by first-class mail upon “an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” The address for the corporation and its agent, if any, can usually be found on the corporation’s website or the California Secretary of State website.
- 3. Compliance with F.R.B.P. 7004(h).** Rule 7004(b)(3) generally applies to corporations, although it does not apply if a party is an insured depository institution. In such a case, Rule 7004(h) applies. Many lienholders are **FDIC-insured institutions and must be served in accordance with Rule 7004(h).**
  - a. Is the lienholder an FDIC-insured institution?** The FDIC website has a feature to search for institutions:  
<http://www2.fdic.gov/idasp/main.asp>. This feature will provide an address and list of officers for the institution. Please note that many institutions are subsidiaries of FDIC-insured institutions (for example, Bank of America Home Loans is a subsidiary of Bank of America, N.A.). In these cases, the FDIC-insured parent must be served in accordance with Rule 7004(h).
  - b. How to accomplish service in accordance with Rule 7004(h)?** Rule 7004(h) requires that service be made by **certified mail** addressed to an officer of the institution.
    - i. Use Certified Mail.** Regular first-class mail, overnight mail or courier, or any other delivery method does not comply with Rule 7004(h); certified mail must be used.
    - ii. Address service to an officer.** An officer of the institution is not the registered agent for service of process, or the FDIC itself. The best sources for finding an officer of an FDIC-insured institution are the FDIC website noted above and the institution’s website. Many courts have held that addressing service to “Officer of the Institution,” “Chief Executive Officer,” or “President” complies with the rule. If the institution’s address is

correct, and it is not possible to locate an officer's name, the court will not find that the motion was served incorrectly (although as a practical matter, it would be rare that an officer's name could not be found).

## **ORDER**

If the court grants a Motion to Avoid Junior Lien, the debtor **must** submit a proposed order, using Local Form 4003-2.4.ORDER, within seven calendar days electronically via the Lodged Order Upload program ("LOU") in accordance with the LOU Procedures contained in Section 4 of the Court Manual posted on the court's website. Use of Local Form 4003-2.4.ORDER is **mandatory**.